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No.

In the Supreme Court of the United States

WILLIAM STERNER, ET AL., PETITIONERS

v.

JOHN P. ROYSTER, SR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e (Supp. V 1999), requires an inmate to exhaust available administrative remedies before filing an action "with respect to prison conditions." The question presented is whether an action alleging that prison officials were involved in an isolated incident of unlawful conduct directed at a particular inmate constitutes an action "with respect to prison conditions" within the meaning of Section 1997e.

PARTIES TO THE PROCEEDINGS

Petitioners are William Sterner, George Shu, Charles DeRosa, Theresa Richetts, Michael Dellamarco, and Clinton Stroble. Respondent is John P. Royster, Sr.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf on William Sterner, George Shu, Charles DeRosa, Theresa Richetts, Michael Dellamarco, and Clinton Stroble, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is not yet reported. The opinion of the district court (App., *infra*, 7a-11a) is reported at 91 F. Supp. 2d 626.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Title 42, Section 1997e, provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e (Supp. V 1999).

STATEMENT

1. On June 11, 1998, John P. Royster (respondent) filed a complaint in the United States District Court for the Southern District of New York, asserting claims against prison officials who had been in charge of his confinement in state and federal prison. App., *infra*, 3a. Respondent's complaint was eventually narrowed to a single claim—that in December 1997, federal prison officials at the Metropolitan Correctional Center denied respondent access to five boxes of legal documents that were allegedly critical to a civil suit he had filed against the Department of Corrections in federal court. *Ibid.* Respondent named as defendants seven federal prison officials—Michael Lopez, William Sterner, George Shu, Charles DeRosa, Theresa Richetts, Michael Dellamarco, and Clinton Stroble. *Ibid.*

The district court dismissed respondent's claim against defendant Lopez on the ground that respondent had not alleged that Lopez was personally involved in the incident. App., *infra*, 7a-8a. The district court dismissed the claims against the other defendants

(petitioners) pursuant to the PLRA exhaustion provision, which directs that "[n]o action shall be brought with respect to prison conditions * * * by a prisoner * * * until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e (Supp. V 1999). The district court held that respondent's action was one "with respect to prison conditions," and that respondent had failed to exhaust available remedies. App., *infra*, 8a-11a.

Addressing the meaning of the phrase "with respect to prison conditions," the district court concluded that "the mere fact that the alleged seizure of [respondent's] legal materials was an isolated, unlawful incident does not preclude application of the PLRA's exhaustion requirement." App., *infra*, 10a. The court reasoned that because the goal of the exhaustion requirement is to "giv[e] prison officials and administrators the initial opportunity to evaluate challenges to how a prisoner is being treated and to correct mistakes in this treatment," it "does not matter whether the prisoner's challenge is to a systemic problem or to one that is individual, or, for that matter, to whether the alleged misconduct is pursuant to a prison policy or *ultra vires*." *Ibid.*

2. The court of appeals affirmed in part, vacated in part, and remanded. App., *infra*, 1a-6a. The court affirmed the district court's order dismissing respondent's claim against defendant Lopez. *Id.* at 6a. The court vacated the district court's order dismissing the case against petitioners on the basis of the PLRA's exhaustion requirement and remanded for further proceedings on that issue. *Ibid.*

On the exhaustion issue, the court noted that it had recently held in *Nussle* v. *Willette*, 224 F.3d 95, 105-106 (2d Cir. 2000), cert. granted *sub nom. Porter* v. *Nussle*,

No. 00-853 (June 4, 2001), that "particularized instances of excessive force directed at an inmate are not 'brought with respect to prison conditions' and therefore are not subject to the exhaustion requirement of the PLRA." App., *infra*, 4a. It further noted that, in *Lawrence* v. *Goord*, 238 F.3d 182, 186 (2d Cir. 2001), cert. pending, No. 00-1619, it had "extended the logic of *Nussle* to hold that the PLRA's exhaustion requirement is similarly inapplicable to cases alleging individualized retaliation against prisoners." App., *infra*, 4a. The court concluded that, in light of *Nussle* and *Lawrence*, the district court had erred in holding that the PLRA's exhaustion requirement applies without regard to whether the inmate challenges a systemic problem or an isolated incident directed at an individual. *Id.* at 5a. The court explained that *Nussle* and *Lawrence* "make clear that whether or not the exhaustion requirement applies to [respondent's] claim will be substantially affected by whether the denial of access to documents [respondent] alleges occurred idiosyncratically or pursuant to some prison policy." *Ibid.* The court of appeals concluded that the question whether respondent's claim is best viewed as a claim challenging prison policy or a claim challenging an individualized action should be resolved by the district court in the first instance. *Ibid.* The court therefore "vacate[d] the district court's dismissal insofar as it was based on the PLRA's exhaustion requirement and remand[ed] the case to that court for reconsideration in light of *Nussle* and *Lawrence*." *Ibid.*[*]

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[*] We have since asked the district court to stay further proceedings pending this Court's decision in *Nussle*. We have also conceded that, under the statutory holding of *Nussle*, respondent is not required to exhaust his claim against petitioners.

ARGUMENT

This case presents the question whether an action alleging that prison officials were involved in an isolated incident of unlawful conduct directed at a particular inmate constitutes an action "with respect to prison conditions" within the meaning of the PLRA's exhaustion provision, 42 U.S.C. 1997e (Supp. V 1999). That question is currently before the Court in *Porter* v. *Nussle*, cert. granted, No. 00-853 (June 4, 2001). In *Nussle*, the Second Circuit held that the exhaustion requirement in the PLRA does not apply to excessive force claims. *Nussle* v. *Willette*, 224 F.3d at 106. The court reasoned that the phrase "prison conditions" refers to "circumstances affecting everyone in the area affected by them, rather than single or momentary matters, such as beatings or assaults, that are directed at particular individuals." *Id.* at 101 (citation and internal quotation marks omitted). Relying on *Nussle* (and a subsequent Second Circuit case applying *Nussle* to retaliation claims), the Second Circuit in this case held that a claim alleging that prison officials unlawfully seized legal materials is an action "with respect to prison conditions" subject to the exhaustion requirement if it was done "pursuant to some prison policy," but not if it "occurred idiosyncratically." App., *infra*, 5a.

The precise question before this Court in *Porter* v. *Nussle* is whether the Second Circuit "erroneously conclude[d], contrary to other courts of appeals, that an inmate bringing a claim for excessive force need not have exhausted available administrative remedies pursuant to the Prison [Litigation] Reform Act's mandatory exhaustion requirement." Pet. (i). As the court of appeals' decision in this case illustrates, the resolution of the exhaustion question in *Nussle* implicates not just

excessive force claims, but all claims involving isolated incidents, rather than broad, recurring practices. Accordingly, the resolution of the question presented in *Nussle* will likely control the resolution of the question presented in this case.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Porter* v. *Nussle*, No. 00-853, and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JULY 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of April, two thousand and one.

PRESENT:

HON. JOSEPH M. MCLAUGHLIN,
HON. GUIDO CALABRESI, AND
HON. ROSEMARY S. POOLER,
Circuit Judges

No. 00-0185

JOHN P. ROYSTER, SR., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; THE SUPREME COURT OF NEW YORK STATE; THE NEW YORK DISTRICT ATTORNEY'S OFFICE; THE METROPOLITAN CORRECTIONAL FACILITY; THE UNITED STATES JUSTICE DEPARTMENT; THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; CHRISTOPHER ARTUZ; LIEUTENANT LOPEZ OF MCC; C.O. BAILEY OF GH; C.O. BICKFORD OF GH; C.O. DEMMARIS OF GH; C.O.K. TORRES; SGT. OVERBY OF GH; DANIEL GOTLIN, AN 18B ATTORNEY, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of New York
Jed S. Rakoff, Judge

[Filed: Apr. 17, 2001]

UPON DUE CONSIDERATION, it is **ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court be and it hereby is **AFFIRMED** in part and **VACATED** in part, and that the case be and hereby it is **REMANDED** to the district court.

I. BACKGROUND

On June 11, 1998, John Royster, Sr. ("Royster") filed a complaint in federal court asserting myriad claims of constitutional violations against prison officials who had been in charge of his confinement in federal and state

prison. Following several rounds of judicial proceedings, Royster's case was narrowed to the claim that in December 1997, while Royster was held at the Metropolitan Correctional Center ("MCC"), Lieutenant Michael Lopez ("Lopez") and six other MCC employees—named Sterner, DeRoso, Shu, Freschette, Dellamarco, and Stroble—denied him access to five boxes of legal documents that were critical to a civil suit that Royster had brought against the Department of Corrections in federal court.[†] Royster claims that this denial violated his federal due process rights.

The district court (Rokoff, *J.*) dismissed with prejudice Royster's complaint against Lopez pursuant to Fed. R. Civ. P. 12(b)(6), on the ground that Royster had not alleged any facts indicating that Lopez was personally involved in denying him access to the legal documents, a necessary element of Royster's constitutional tort claim. *See Sealey* v. *Giltner*, 116 F.3d 47, 51 (2d Cir. 1997). In addition, the district court dismissed without prejudice Royster's complaint against the remaining defendants on the ground that the Prison Litigation Reform Act (the "PLRA"), 42 U.S.C. § 1997e(a), requires Royster to exhaust his administrative remedies prior to seeking relief in the courts in actions "brought with respect to prison conditions," and that Royster had not done so.

Royster now appeals.

[†] Royster alleges that he had been commanded, by MCC personnel, to surrender these boxes of documents on December 4, 1997.

II. DISCUSSION

Since the district court's March 30, 2000 Memorandum and Order in this case, two opinions of our Court have been issued which require reconsideration of the decision of the court below. First, in *Nussle* v. *Willette*, 224 F.3d 95, 105-6 (2d Cir. 2000), we held that claims of particularized instances of excessive force directed at an inmate are not "brought with respect to prison conditions" and therefore are not subject to the exhaustion requirement of the PLRA. And second, in *Lawrence* v. *Goord*, 238 F.3d 182, 186 (2d Cir. 2001) (per curiam), we extended the logic of *Nussle* to hold that the PLRA's exhaustion requirement is similarly inapplicable to cases alleging individualized retaliation against prisoners. Importantly, we noted in *Lawrence* that "[t]he underlying principles requiring exhaustion —giving notice to administrators and allowing policy makers to change their behavior—are not served when a practice is aimed at one specific inmate rather than the prison population as a whole." *Id.* at 186. *See also Nussle*, 224 F.3d at 106 (noting in a related context that there is no reason to extend the exhaustion requirement to cases "that do not contemplate ongoing judicial supervision or some other form of 'prospective relief' affecting large numbers of inmates—let alone individual claims that complain of past, wholly completed conduct").

The PLRA's exhaustion requirement has thus been substantially clarified since the district court issued its Memorandum and Order. In particular, the district court's conclusion that "[i]t . . . . does not matter [to the applicability of the exhaustion requirement] whether the prisoner's challenge is to a systematic

problem or to one that is individual, or, for that matter, to whether the alleged misconduct is pursuant to a prison policy or *ultra vires*," does not, in light of *Nussle* and *Lawrence*, reflect the law of our Circuit. These opinions make clear that whether or not the exhaustion requirement applies to Royster's claim will be substantially affected by whether the denial of access to documents Royster alleges occurred idiosyncratically or pursuant to some prison policy. This question was understandably not addressed below, and is not properly decided on appeal without the benefit of a district court record and decision. Accordingly, we vacate the district court's dismissal insofar as it was based on the PLRA's exhaustion requirement and remand the case to that court for re-consideration in light of *Nussle* and *Lawrence*.[‡]

Finally, because none of the preceding considerations affects the district court's dismissal with prejudice of Royster's claim against Lopez, we affirm this dismissal for substantially the reasons given by that court.

[‡] In light of this remand, we do not now consider the question —which remains unsettled in this Circuit, *see Nussle*, 224 F.3d at 100 n. 5—of whether the PLRA requires the exhaustion of administrative remedies even when prisoners seek relief, in this case monetary damages, not available through administrative channels.

III. CONCLUSION

We have reviewed all Royster's remaining claims and find them to be without merit. Accordingly, the district court's dismissal with prejudice of the case against Lopez is **AFFIRMED**; the district court's dismissal without prejudice of the case against the remaining defendants is **VACATED**; and the case is **REMANDED** to the district court for further consideration consistent with this order.

For the Court,

ROSEANN B. MACKECHNIE
Clerk of Court

by: /s/ LUCILLE CARR

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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98 Civ. 4109 (JSR)

JOHN P. ROYSTER, SR., PLAINTIFF

v.

UNITED STATES OF AMERICA, THE SUPREME COURT OF NEW YORK STATE; THE NEW YORK DISTRICT ATTORNEY'S OFFICE, THE METROPOLITAN CORRECTIONAL FACILITY; LIEUTENANT LOPEZ OF MCC, C.O. BAILEY OF GH, C.O. BICKFORD GH, C.O. DEMMARIS OF GH, C.O. K. TORRES, SGT. OVERBY OF GH, AND DANIEL GOTLIN, AN 18B ATTORNEY, DEFENDANTS

[Filed: Mar. 31, 2000]

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

On June 11, 1998, then-Chief Judge Griesa, to whom the case was previously assigned, dismissed the complaint with leave to plaintiff to re-plead only the claim that officials of the Metropolitan Correctional Center ("MCC") intentionally delayed plaintiff's access to certain legal materials during the course of his then-pending civil suit against the New York Department of Corrections. *See* Order dated June 11, 1998. Following re-pleading, Magistrate Judge Ellis, on November 24,

1999, filed a Report and Recommendation (the "Report") recommending that the Court dismiss the complaint on the ground that plaintiff had failed to allege any personal involvement by defendant Michael Lopez, who, according to the Report, was the only defendant Judge Griesa's June 11 Order permitted plaintiff to name in his re-pleaded complaint.

This Court, having now reviewed *de novo* the parties' timely objections to the Report,[§] concludes that the claims against defendant Lopez should be dismissed for the reasons stated in the Report (which to this extent the Court adopts by reference) but that the Report erred in interpreting Judge Griesa's Order to preclude the naming of other defendants. Specifically, the Court does not read Judge Griesa's June 11 Order as precluding plaintiff, in his re-pleaded complaint, from naming defendants other than Lopez if they are alleged to be directly involved in the assertedly unlawful seizure of plaintiff's legal materials at the MCC. Accordingly, plaintiff's motion dated January 21, 1999 to amend the re-pleaded complaint to add other defendants besides Lopez who were allegedly involved in such seizure—a motion not directly addressed in the Report but implicitly denied—must instead be granted.

Given the putative addition of these other defendants, it becomes necessary for this Court to consider the other prong of defendant Lopez's motion to dismiss —*i.e.*, the claim that plaintiff failed to exhaust his administrative remedies under the Prison Litigation

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[§] Plaintiff's claim that defendant's objections to the Report were untimely, *see* Pl.'s Letter dated December 16, 1999, is without merit. *See* 28 U.S.C. § 636(b)(1)(C); Rule 72, Fed. R. Civ. P.; *see also* Rule 6, Fed. R. Civ. P.

Reform Act (the "PLRA"), 42 U.S.C. § 1997e(a)—since that contention, if valid, would automatically mandate dismissal as to the putatively-added defendants as well. The PLRA provides, in relevant part, that "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Judge Ellis, however, determined that plaintiff's claim was not subject to the PLRA's exhaustion requirement because, first, it did not involve an action "with respect to prison conditions" and, second, there was no "available" administrative remedy. The Court disagrees with both points.

As to the first point, Judge Ellis chiefly relied on those cases that have held that the "action[s] . . . with respect to prison conditions" to which the PLRA's exhaustion requirement pertains do not include claims of excessive force involving no prison policy. *See, e.g.*, *Carter* v. *Kiernan*, No. 98 Civ. 2664 (JGK), 1999 WL 14014, at *5 (S.D.N.Y. Jan. 14, 1999) (PLRA's exhaustion requirement does not apply to claims of excessive force); *Wright* v. *Dee*, 54 F. Supp. 2d 199, 205-06 (S.D.N.Y. 1999) (same). This view is far from uniformly held, *see, e.g.*, *Beeson* v. *Fishkill Correctional Facility*, 28 F. Supp. 2d 884, 888 (S.D.N.Y. 1998) (PLRA's exhaustion requirement applies even to such claims); *Diezcabeza* v. *Lynch*, 75 F. Supp. 2d 250, 255 (S.D.N.Y. 1999) (same), and the Second Circuit has not yet directly addressed the issue, *see Liner* v. *Goord*, 196 F.3d 132, 135 (2d Cir. 1999) ("The law concerning the PLRA's exhaustion requirement is in great flux."). But the controversy is here irrelevant because, in con-

tradistinction to the public policy and constitutional considerations implicit in any exception for claims of excessive force, the mere fact that the alleged seizure of plaintiff's legal materials was an isolated, unlawful incident does not preclude application of the PLRA's exhaustion requirement.

In enacting the PLRA, Congress sought both to reduce the increasing number of frivolous prisoner lawsuits and to end alleged judicial micromanagement of prisons. *See, e.g., Beeson*, 28 F. Supp. 2d at 891 (citing legislative history). The PLRA's exhaustion requirement seeks to implement these goals by giving prison officials and administrators the initial opportunity to evaluate challenges to how a prisoner is being treated and to correct mistakes in this treatment prior to any judicial involvement in the particular controversy. It therefore does not matter whether the prisoner's challenge is to a systemic problem or to one that is individual, or, for that matter, to whether the alleged misconduct is pursuant to a prison policy or *ultra vires*. Thus, contrary to Judge Ellis's belief, plaintiff was still required to exhaust his administrative remedies regardless of whether the prison officials confiscated his legal materials pursuant to a particular prison policy or whether they took them without any apparent legal authority whatever.

As to the second point, Judge Ellis believed that plaintiff was not required to exhaust administrative remedies because the relief that plaintiff sought, *i.e.*, monetary damages, was not available through the administrative remedy scheme. While this argument might make sense in certain contexts, here, however, its effect would be to seriously jeopardize the afore-

mentioned purposes of the PLRA. *See, e.g., Funches* v. *Reish*, No. 97 Civ. 7611 (LBS), 1998 WL 695904, at *8 (S.D.N.Y. Oct. 5, 1998); *see also Diezcabeza*, 75 F. Supp. 2d at 252. "If an inmate may avoid administrative review procedures simply by limiting the complaint to a request for monetary damages, Congress's intent in creating a broad exhaustion requirement in § 1997e will be thwarted." *Funches*, 1998 WL 695904, at *9. By contrast, requiring that prisoners first seek review through administrative process even when their requested remedy is damages serves the beneficial purpose not only of administrative review of allegedly unlawful conduct but also of creating an administrative record that may be useful to a court. *See Beeson*, 28 F. Supp. 2d at 895. Indeed, the potential utility of such a record is well illustrated here, since the current record, as Judge Ellis recognized, provides the Court with virtually no information about the alleged seizure of plaintiff's legal materials. Accordingly, for the foregoing reasons, the Court dismisses with prejudice plaintiff's claims against defendant Lopez, grants plaintiff's motion to add other defendants, and, having done so, dismisses without prejudice plaintiff's claims against these other defendants. Clerk to enter judgment.

SO ORDERED.

/s/ JED S. RAKOFF
JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
March 30, 2000